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In the Supreme Court of the United States

OCTOBER TERM, 1968

RAMSEY CLARK, ET AL., APPELLANTS

v.

CHARLES JOSEPH CUNEY GABRIEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (Appendix A, *infra*, pp. 11-12) is not yet reported.

JURISDICTION

1. Appellee, a Selective Service registrant classified I-A despite his claim to conscientious objector status, brought a pre-induction suit to review his classification and enjoin his impending induction. He based

jurisdiction upon the United States Constitution, Article I, Section 1; Article II, Section 1; Article III, Section 1; the First Amendment; the Fifth Amendment; and 28 U.S.C. 1331, 1361, 1651, and 2201. He alleged that the amount in controversy exceeded $10,000.

2. On June 28, 1968, the district court held that the bar to pre-induction judicial review of Selective Service classifications contained in Section 10(b)(3) of the Military Selective Service Act of 1967, as amended by Public Law 90-40 (50 U.S.C. App. 460 (b)(3)), is unconstitutional, and enjoined appellee's induction pending a determination on the merits of his claim (Appendix B, *infra*, pp. 13-15). Notice of appeal to this Court was filed in the district court on July 29, 1968.

3. 28 U.S.C. 1252 confers jurisdiction upon this Court to review, on direct appeal, "an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."[1]

4. The decision below was appropriately rendered by a single district judge (*International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304

[1] 28 U.S.C. 1292(a)(1) authorizes an interlocutory appeal to a court of appeals from a district court order granting, denying or otherwise affecting injunctive relief, "except where a direct review may be had in the Supreme Court."

U.S. 243),[2] and the holding that the statute is unconstitutional is directly appealable to this Court (*Flemming* v. *Nestor*, 363 U.S. 603; *United States* v. *Raines*, 362 U.S. 17).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967, which bars pre-induction judicial review of the classification of Selective Service registrants, is constitutional when applied to preclude such review of a local board's denial of a registrant's claim to conscientious objector status.

STATUTE INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967, as amended by Public Law 90-40 (50 U.S.C. App. 460(b)(3)), provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively

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[2] Under *Donnelly Garment Co.*, the requirement of a three-judge district court under 28 U.S.C. 2282 is inapplicable where, as here, the constitutionality of an act of Congress is merely "drawn in question," as distinguished from actions where there is an application to restrain enforcement of a federal statute (304 U.S. at 248-250). Here appellee challenged his induction order on the ground that he had been improperly denied conscientious objector status; the government asserted that Section 10(b)(3), as amended in 1967, prohibited such a pre-induction suit; and the district court rejected the government's attack on its jurisdiction by holding the statute unconstitutional.

to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

STATEMENT

Appellee, a Selective Service registrant classified I-A despite his claim that he is a conscientious objector, exhausted his administrative remedies, and then brought the instant action seeking a determination that such classification was improper. He also sought to have his classification changed to I-O and his impending induction enjoined, on the ground that the denial of his claim for conscientious objector status had no basis in fact, rested on a misapplication of the statutory requirement that opposition to war be grounded on a registrant's "religious training and belief" (50 U.S.C. App. 456(j)), and resulted from prejudice and hostility by his local board. Relying upon *Petersen* v. *Clark*, Civil No. 47888 (N.D. Calif., decided May 28, 1968), the district court held the provision of Section 10(b)(3) which prohibits pre-induction judicial review of Selective Service classifications unconstitutional, and enjoined appellee's induction pending a determination on the merits of his claim (App. A., p. 11).[3]

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[3] A copy of the district court's opinion in *Petersen*, on which the district court extensively relied, is included as Appendix C, *infra*, pp. 17-45. That case similarly involved a Selective

THE QUESTION IS SUBSTANTIAL

1. This case presents another facet of the problem involved in *Oestereich* v. *Selective Service System Local Board No. 11*, 390 F. 2d 100 (C.A. 10), certiorari granted, 391 U.S. 912 (No. 46, this Term). The question in *Oestereich* is whether the prohibition in Section 10(b)(3) of the Military Selective Act of 1967 against pre-induction judicial review of Selective Service classifications may be applied to bar such review of the delinquency

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Service registrant who sought a conscientious objector classification. Unlike appellee, Petersen's impending induction was not enjoined, and on January 25, 1968, he refused to submit to induction. However, the court in *Petersen* thereafter held the provisions of Section 10(b)(3) precluding judicial review prior to induction unconstitutional, and therefore entertained Petersen's "civil suit to determine the validity of his induction order and to determine whether an injunction against criminal prosecution is jusitfied" (App. C, p. 44). No appeal was taken by the government from this decision, since the district court enjoined neither the registrant's induction nor his pending criminal prosecution for failure to submit to induction. On June 19, 1968, Petersen was indicted for failing to submit to induction (50 U.S.C. App. 462), and the criminal case (Criminal No. 42140) is set for trial in November. On September 19, 1968, Judge Zirpoli rendered judgment in the civil case in Petersen's favor, albeit on narrow grounds, concluding that he was entitled to a reopening of his classification and reconsideration thereof by his local board.

Subsequent to the decision in the instant case, the same district court enjoined the induction of another registrant who had unsuccessfully sought conscientious objector status. *Scherbatskoy* v. *Local Board No. 76*, Civil No. 49259 (N.D. Calif., decided August 2, 1968). There the court relied on the earlier holdings in *Petersen* and in the instant case. Since the factual background as well as the legal issues presented in *Scherbatskoy* are virtually identical to these invloved here, no appeal has been taken in that case.

reclassification, for non-possession of his draft card, of a registrant with a statutory exemption from military service and training as a ministerial student. In that case the Solicitor General, although supporting the constitutionality under the First Amendment of the prohibition of pre-induction judicial review (see Resp. Br., pp. 16-35), concluded that the unqualified statutory prohibition upon such review "can best be reconciled" with the unqualified statutory exemption for ministerial students "by permitting petitioner to maintain a pre-induction suit challenging his delinquency reclassification" (*id.* at 66).

The present case differs from *Oestereich* in two significant respects:

(1) Appellee's classification as I-A did not result from a delinquency reclassification which terminated an existing exemption grounded on an express statutory provision. Rather, he was so classified in a typical proceeding in which a local board considered and ruled against a claim that the registrant was entitled to conscientious objector status.

(2) Unlike a ministerial student, who under the statute is "exempt from training and service" (Section 6(g), 50 U.S.C. App. 456(g)), conscientious objectors merely are not "require[d] * * * to be subject to combatant training and service"; in lieu thereof they are required to perform either non-combatant or civilian work contributing to the maintenance of the national health, safety or interest (Section 6(j), 50 U.S.C. App. 456(j)). Thus, a registrant who claims conscientious objector status cannot rely upon the

same broad and absolute exemption that the statute gives to ministerial students. Moreover, as is pointed out in the brief filed in the *Oestereich* case (pp. 65-66):

> The question of the validity of a claim to conscientious objector status may be one of great difficulty and cannot be as readily determined on an objective basis, as the other grounds for exemption. The determination of such status involves more of the process of "classification" that Congress has committed to the discretion of the local boards. It is also a situation where the disruption of the orderly process of obtaining military manpower would be greater than in the case of the clear and direct exemptions specifically granted by Congress. * * *

2. If the Court agrees in the *Oestereich* case that pre-induction review should be permitted of a delinquency reclassification of a registrant with an express statutory exemption—either as a matter of statutory interpretation or on constitutional grounds—it would not follow that Congress did not, or could not constitutionally, preclude pre-induction judicial review in the situation presented by the present case. Here, unlike the situation in *Oestereich*, there can be no claim that denial of the registrant's claim to conscientious objector status and his classification as I-A would have any "chilling effect" upon the exercise of First Amendment rights (cf. *Dombrowski* v. *Pfister*, 380 U.S. 479). Although appellee's claim that the Selective Service System misapplied the statutory test for determining conscientious objector status may have First Amendment overtones (see *United States* v.

Seeger, 380 U.S. 163), it cannot fairly be contended that pre-induction review of his classification is necessary to prevent a restriction on the exercise of his rights under that constitutional provision.

The district court concluded that Section 10(b)(3) raises an unconstitutional barrier to judicial review because of the hardship to a registrant if he is required to risk criminal prosecution or to submit to induction in order to test his claim to conscientious objector status. Congress made the judgment, however, that such hardship is justified in order "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell))—interruptions typified by the stays of induction that have been entered in this and similar cases. In the absence of the special and unusual circumstances involved in *Oestereich*, we believe that Congress may constitutionally preclude pre-induction judicial review in a case such as the present one, and that the contrary holding of the district court is erroneous.

3. The question of the constitutionality of Section 10(b)(3) as applied in cases not involving delinquency reclassification of a registrant with an express statutory exemption is of substantial importance in the operation of the Selective Service System. The decision below rests upon a rejection of the congressional determination that the need to avoid "litigious interruptions" in the raising of military manpower outweighs any hardship to individual registrants from being required to litigate the validity of their classifications either in habeas corpus proceedings after

induction or as a defense to a criminal prosecution for refusal to be inducted. This broad ruling is likely to engender a large number of suits by registrants seeking to avoid induction on various grounds. In view of the particular circumstances involved in *Oestereich*, this Court's decision there may not definitively determine the constitutionality of Section 10(b)(3) as applied in the typical Selective Service case. The present case is an appropriate vehicle for deciding that broader question.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted.

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